COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-323

COMMONWEALTH

vs.

MACKENDY CALICE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant is a Haitian citizen and lawful permanent resident of the United States who has lived in this country since he was four years old. In 2005, when he was nineteen, the defendant admitted to sufficient facts to warrant guilty findings on the charges of receiving stolen property, possessing ammunition without a firearms identification card, and using a motor vehicle without authority. The defendant's admissions were accepted by a judge of the District Court who rejected the defendant's recommended sentences of concurrent one-year terms of probation on each offense, and accepted the Commonwealth's recommendation of concurrent one-year sentences to the house of correction, with concurrent terms of fifty-nine days to serve and the balances suspended for one year.

Nearly eleven years later, on June 9, 2016, the defendant filed a motion to vacate his plea and for a new trial. He claimed that plea counsel rendered ineffective assistance when he (1) neglected to tell the defendant that he could be deported because of his plea, and (2) failed to negotiate a sentence that was less than one year in order to avoid that consequence. The motion was supported by written tenders of admission and waiver of rights, known as "green sheets," the defendant's affidavit, the affidavit of appellate counsel, an e-mail indicating that plea counsel would not be providing an affidavit because he could not recall the case, a social worker's 2014 letter outlining the defendant's diagnoses of psychotic disorder and posttraumatic stress disorder, excerpts from a scholarly article reviewing literature about culture and mental health in Haiti, and a 2015 decision by the United States Board of Immigration Appeals.[1,2] In his affidavit, the defendant asserts that plea counsel did not tell him that he could be deported as a result

[1] From this decision, we can discern that the defendant applied for deferral of an order of removal under the Convention Against Torture, arguing that he should not be deported because the medication he takes to treat his mental illness is not available in Haiti and that, without proper medication, his psychotic symptoms would emerge and cause him to "be singled out for abusive treatment that rises to the level of torture." A Federal immigration judge denied the defendant's application and the defendant appealed. The board remanded the case to the trial judge for specific findings regarding what is likely to happen to the defendant in Haiti.

[2] A transcript of the plea hearing is not available.

of the plea. Had he been aware of that risk, the defendant claims that he would not have admitted to sufficient facts and would have proceeded to trial because (1) his family lived in the United States, (2) he had lived in the United States for nearly sixteen years at that point, and (3) he suffers from mental illnesses for which he would be punished and denied treatment in Haiti.

After hearing arguments from counsel, the same judge who had taken the defendant's plea found that (1) the defendant pleaded to sufficient facts and accepted the sentence "after disparate recommendations to the court," (2) a full colloquy occurred along with a written waiver of rights signed by the defendant and his counsel, (3) "[t]he court . . . gives the same colloquy each time, including all immigration warnings," and (4) the defendant had a violation of probation in 2009, "and raised no issue of not being advised of any rights."[3] The judge denied the motion by margin endorsement, stating: "[p]arties rested on arguments of counsel and written documents in support of motion;

[3] The defendant's original sentence was suspended until July 25, 2006. The defendant did not appear for a November 14, 2005 restitution hearing and remained in default until 2009, when, after a hearing, he was adjudged in violation of his probation and sentenced to serve concurrent terms of ten months' incarceration on each charge, which appear to be the remainder of his suspended sentences.

showing has not been made, motion is denied." The defendant appeals. We vacate the order and remand for further findings.

Discussion. A motion to vacate an admission to sufficient facts is treated as a motion for a new trial under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). See Commonwealth v. Muniur M., 467 Mass. 1010, 1011 (2014). We review the denial of such a motion for "a significant error of law or other abuse of discretion." Commonwealth v. Lastowski, 478 Mass. 572, 575 (2018), quoting Commonwealth v. Sylvester, 476 Mass. 1, 5 (2016). An abuse of discretion occurs "where we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Because the defendant is not a United States citizen and there is no question that his admissions would subject him to deportation, the Constitution required plea counsel to advise the defendant of that consequence. See Padilla v. Kentucky, 559 U.S. 356, 374 (2010); Commonwealth v. Lys, 481 Mass. 1, 5 (2018). The defendant asserts that plea counsel did not do so. Such a failure would constitute behavior falling "measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

The judge made no findings regarding plea counsel's advice to the defendant and appears to have concluded that, regardless of the advice, the defendant suffered no prejudice because (1) a full written colloquy was signed by both the defendant and plea counsel, (2) her usual practice was to give "all immigration warnings" during the course of a plea colloquy, and (3) the defendant raised no issue with respect to immigration warnings when his probation was revoked in 2009.

However, the Constitution requires that counsel "advise his or her clients about a guilty plea's 'truly clear' deportation consequences." Lys, 481 Mass. at 5, quoting Padilla, 559 U.S. at 369, 374. If he did not, then the defendant is entitled to withdraw his pleas if he can show "that a decision to reject the plea bargain would have been rational under the circumstances." Lastowski, 478 Mass. at 577, quoting Commonwealth v. Clarke, 460 Mass. 30, 47 (2011). That analysis requires a consideration of whether the defendant has shown (1) that he had an available, substantial ground of defense that he would have pursued if given proper advice, (2) a reasonable probability that he could have negotiated a plea bargain that did not include immigration consequences, or (3) "special circumstances supporting the conclusion that [he] 'placed, or would have placed, particular emphasis on immigration consequences in deciding whether to

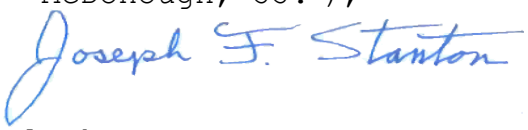
plead guilty.'" Lys, supra at 7, quoting Clarke, supra at 47-48.

In a sworn statement, the defendant stated that the following "special circumstances" would have affected his decision to admit to sufficient facts had he known the risk of deportation: his family lived in the United States; he had lived in the United States for sixteen years at that point; he suffered from mental illnesses for which treatment was unavailable in Haiti; and he would be punished in Haiti rather than treated if he misbehaves due to his mental illness. The judge did not address the defendant's claims but summarily concluded that the required "showing has not been made." Because we do not know whether the judge discredited the defendant's assertions "or whether [s]he decided that the defendant did not aver any facts that, even if believed, would qualify as special circumstances," Lys, 481 Mass. at 8, we cannot say whether she "made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. at 185 n.27. The order denying the motion to withdraw admission to sufficient facts therefore must be vacated and the case remanded for further findings consistent with this

memorandum and order.[4] On remand, the judge may, in his or her discretion, hold an evidentiary hearing on the defendant's motion for such purposes.

So ordered.

By the Court (Kinder, Singh & McDonough, JJ.[5]),



Clerk

Entered: August 26, 2019.

[4] The case must be remanded to a different judge because the plea and motion judge has since retired.

[5] The panelists are listed in order of seniority.